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No. 92-2038

# In the Supreme Court of the United States

OCTOBER TERM, 1993

ASGROW SEED COMPANY, PETITIONER

*v.*

DENNY WINTERBOER AND BECKY WINTERBOER, d/b/a DEEBEES

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTIONS PRESENTED

The Plant Variety Protection Act (PVPA or Act), 7 U.S.C. 2321 *et seq.*, generally grants the breeder of a novel variety of a sexually reproduced plant the exclusive right to sell that variety for an 18-year period. That right is enforceable by a civil action for infringement in federal district court. The PVPA exempts from infringement liability, however, certain sales of "saved seed" between farmers. 7 U.S.C. 2543. The questions presented are:

1. Whether the Federal Circuit correctly interpreted the "saved seed" exemption to allow farmers to sell up to half of each crop they produce from a PVPA-protected variety to other farmers for use as seed.

2. Whether a sale of seed pursuant to the "saved seed" exemption must comply with the requirement in 7 U.S.C. 2541(6) (1988) that, in order for a sale to be non-infringing, the seller must provide notice of the seed's status as a protected variety.

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## INTEREST OF THE UNITED STATES

This case concerns the scope of the "saved seed" exemption in the Plant Variety Protection Act, 7 U.S.C. 2543. The Federal Circuit held that, under that exemption, a farmer may sell up to 50% of a crop produced from a novel variety of seed to other farmers for use as seed, even though the sale would otherwise infringe the rights accorded under the Act to the owner of the novel variety. The Federal Circuit further held that, with respect to sales permitted under the saved seed exemption, the selling farmer need not provide notice to the purchasing farmer that the seed is a novel variety protected under the

Act, even though notice would otherwise be required. This Court granted certiorari to review both holdings.

The United States has a substantial interest in the questions presented here. The Department of Agriculture is responsible for issuing certificates of plant variety protection to the owners of novel varieties. 7 U.S.C. 2482. The effectiveness of those certificates in promoting the purpose of the Act—which is to "afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties," 7 U.S.C. 2581—depends to a significant extent on the proper interpretation of the scope of the saved seed exemption. In addition, the United States is a member of the 1978 International Convention for the Protection of New Varieties of Plants, Oct. 23, 1978. The United States has an interest in the proper interpretation of the PVPA, as it covers the same subject. At the Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

## STATEMENT

1. The Plant Variety Protection Act of 1970 (PVPA or Act), 7 U.S.C. 2321 *et seq.*, grants patent-like protection to the breeders of novel varieties of sexually reproduced plants. Sexually reproduced plants are those produced by seed, rather than by asexual methods such as grafting, budding, and cuttings. 7 U.S.C. 2401(f); see *Kim Bros.* v. *Hagler*, 167 F. Supp. 665, 667 (S.D. Cal. 1958), aff'd, 276 F.2d 259 (9th Cir. 1960); *Plant Variety Protection: Hearing on H.R. 13424, etc., Before the Subcomm. on Departmental Operations of the House Comm. on Agriculture*, 91st Cong., 2d Sess. 41 (1970) [hereinafter *House Hearing*]. A number of major agricultural crops in the United States are sexually reproduced, including soybeans, cotton, wheat, barley, oats, and rice. *House Hearing* 9.[1]

[1] Asexually reproduced plants are afforded patent protection under a separate statute enacted in 1930. Act of May 23, 1930, ch. 312, 46 Stat. 376, 35 U.S.C. 161-164; see also S. Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970) (1930 Act and PVPA provide "[s]imilar protection").



Under the PVPA, the breeder of a novel variety of a sexually reproduced plant may apply to the Secretary of Agriculture for a certificate of plant variety protection. 7 U.S.C. 2421; see also 7 U.S.C. 2402(a). The application must show that the variety has (1) "[d]istinctness" from existing varieties; (2) "[u]niformity in the sense that any variations are describable, predictable, and commercially acceptable"; and (3) "[s]tability," in the sense that the variety, when reproduced, generally "will remain unchanged with regard to its essential and distinctive characteristics." 7 U.S.C. 2401(a). The application is ruled upon by the Plant Variety Protection Office (PVPO) established within the Department of Agriculture. 7 U.S.C. 2481, 2482.[2]

A certificate of plant variety protection covers "seed, transplants, and plants" of the novel variety. 7 U.S.C. 2401(a). It certifies that the owner of the variety has the right, for a period of 18 years:

> to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this chapter.

7 U.S.C. 2483(a). A separate section of the Act, 7 U.S.C. 2541, specifies that it infringes an owner's rights to:

> (1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or

[2] If the application is "refused" (*i.e.*, denied) by the PVPO, the applicant may appeal to the Secretary and, if dissatisfied with the Secretary's decision, may seek judicial review in federal court. 7 U.S.C. 2443. Judicial review of the Secretary's decision is available in either the United States District Court for the District of Columbia or the Federal Circuit. 7 U.S.C. 2461, 2462; 28 U.S.C. 1338(a). Appeals from district court decisions in such cases lie exclusively in the Federal Circuit. 28 U.S.C. 1295(a)(1).

solicit an offer to buy it, or any other transfer of title or possession of it;

* * * * *

(3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or

(4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom; or

* * * * *

(6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received.[3]

The Act separately provides for public notice of the owner's rights by requiring certificates to "be recorded in the [PVPO]," 7 U.S.C. 2482, and by authorizing the Secretary to "establish public facilities for the searching of plant variety protection records and materials," 7 U.S.C. 2330(b)(1). The Act also authorizes owners to "give notice to the public" by labelling seed or seed containers "with * * * the words 'Unauthorized Propagation Prohibited' or the words 'Unauthorized Seed Multiplication Prohibited' and after the certificate issues, such additional words as 'U.S. Protected Variety.'" 7 U.S.C. 2567.

The provision of the Act primarily at issue in this case, Section 2543, describes certain actions that do not infringe certain of the owner's rights:

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[3] Section 2541 was amended in 1992; the existing provision was designated subsection (a) and a subsection (b) was added. See Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4231. The new subsection is not relevant to the questions presented here and, for the sake of consistency with the opinions below and the other filings, we will refer hereafter to the 1988 version of 2541.



**§ 2543. Right to save seed; crop exemption**

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

An owner whose rights have been infringed may bring a civil action against the infringer. 7 U.S.C. 2561. Jurisdiction over infringement actions lies exclusively in the federal district courts. 28 U.S.C. 1338(a). Appeals from decisions of the district courts in infringement actions lie exclusively in the Federal Circuit. 28 U.S.C. 1295(a)(1).

The court in an infringement action may award injunctive relief, damages, and, "in exceptional cases," attorney's

fees to the prevailing party. 7 U.S.C. 2563, 2564(a), 2565. The court's discretion to award damages is limited, however, "[i]n the event the novel variety is distributed by authorization of the owner and is received by the infringer" without labeling that indicates its protected status. 7 U.S.C. 2567. In that case, "no damages shall be recovered against such infringer by the owner * * * unless the infringer has actual notice of [*sic*] knowledge that propagation is prohibited or that the variety is a protected variety, in which event damages may be recovered only for infringement occurring after such notice." *Ibid.*

2. Respondents Dennis and Becky Winterboer own a farm in Clay County, Iowa. In 1990, they planted 265 acres of soybeans on their farm, using two novel varieties of soybean. Both varieties were covered by certificates of plant variety protection assigned to petitioner Asgrow Seed Company. Pet. App. 4a, 16a, 35a; see also Pet. 4. The planting produced 10,529 bushels of soybeans suitable for seeding purposes, all of which the Winterboers sold to other farmers for use as seed. Pet. App. 4a, 35a; see Pet. 4-5. Such sales of harvested seed by one farmer to another for seeding purposes are known as "brown bag sales."[4]

Asgrow brought this infringement action against the Winterboers in the United States District Court for the Northern District of Iowa. Asgrow alleged that the Winterboers' brown bag sales of soybeans produced from Asgrow's two novel varieties violated 7 U.S.C. 2541(1), which prohibits the sale of a novel variety; 7 U.S.C. 2541(3), which prohibits the sexual multiplication of a novel variety as a step in marketing it for growing purposes; and 7 U.S.C. 2541(6), which prohibits the dis-

[4] Harvested soybeans can be used for reproduction purposes — *i.e.*, as seed—or for consumption purposes, such as for animal feed or human consumption. See *House Hearing* 26. The PVPA uses several terms to describe the former type of use, including "growing purposes" (7 U.S.C. 2541), "reproductive purposes" (7 U.S.C. 2543), and "seeding purposes" (*ibid.*). There appears to be no difference in the meaning of those terms relevant to this case, and we therefore use the terms interchangeably.



pensing of a novel variety without notice that the variety is protected under the Act. The Winterboers argued that the sales did not violate those provisions because they fell within the exemption in Section 2543. See Pet. App. 16a-18a.

The district court granted summary judgment in favor of Asgrow, holding that the Winterboers' sales were not exempt from infringement liability under Section 2543. Pet. App. 15a-26a. The court read the first sentence of Section 2543 to "allow[] a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year." Pet. App. 21a. In the court's view, the farmer then may sell the seed that had been saved for replanting purposes, but no more, if the farmer's plans have changed—for example, because of a change in market conditions. *Id.* at 22a.

Because the Winterboers "admittedly have sold much more than" was necessary to replant their soybean acreage, Pet. App. 24a, the district court concluded that they had violated 7 U.S.C. 2541(1) and 2541(3).[5] The court permanently enjoined the Winterboers "from selling seed, except for saved seed, to other farmers," Pet. App. 24a, but it deferred ruling on damages, *id.* at 24a-25a.

3. The court of appeals reversed. Pet. App. 1a-14a. It concluded that "[t]he district court erred in * * * read[ing] the crop exemption [in Section 2543] to limit brown bag sales of novel varieties to the maximum amount of seed the selling farmer would save to plant another crop of like size." Pet. App. 10a.[6]

[5] The court found it unnecessary to determine whether the Winterboers also had violated 7 U.S.C. 2541(6) by failing to provide notice of the protected status of the seed to the purchasers of their brown bag seed. Pet. App. 25a. Nonetheless, the court stated that it "interpret[ed]" 7 U.S.C. 2541(6) "to require that if a farmer does sell saved seed to another farmer he must label it as a protected variety." Pet. App. 17a n.2.

[6] The court of appeals believed that the source of the district court's error was its mistaken belief that the phrase "for seeding purposes" in

While rejecting the "ensuing crop limitation" adopted by the district court, the court of appeals did discern other limits on the sale of seed under Section 2543. Pet. App. 10a. First, the court of appeals held that "a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed." *Id.* at 6a. Second, the court noted that "[b]oth the buyer and seller of brown bag seed must be farmers," and that "their primary farming occupation * * * must be to grow crops for sale as food or feed, rather than to grow crops for sale as seed." *Id.* at 7a. In the court's view, the determination of a farmer's "primary farming occupation" must be made "on a crop-by-crop basis." *Id.* at 8a. Under that approach, a farmer may sell up to (but not including) 50% of each crop produced from a PVPA-protected variety to other farmers for seeding purposes, as long as the farmer sells the rest of that crop for consumption purposes. *Ibid.*

Third, the court determined that the reference to Section 2541(3) in the opening clause of Section 2543 limits brown bag sales of seed by "clarif[ying] that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541," Pet. App. 12a. The court believed that, in determining what conduct is proscribed under subsection (3), which provides that it is an infringement to sexually multiply a novel variety as a step in marketing it for growing purposes, "[a]n expansive reading of the term 'marketing' would swallow the entire crop exemption." *Ibid.* The court accordingly held that subsection (3) reaches only one "form of marketing"—"extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet.

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the first sentence of Section 2543 modifies "saved," and thus restricts the purpose for which seed may be saved. Pet. App. 11a. Instead, the court of appeals explained, the phrase "for seeding purposes" modifies "obtained," and thus describes the purpose for which seed was originally obtained from the owner of the variety. *Id.* at 11a-12a.



App. 12a-13a. The court of appeals left it for the district court to decide on remand whether the Winterboers had engaged in that form of marketing. *Id.* at 13a.

Finally, the court of appeals rejected Asgrow's argument that brown bag sales are subject to Section 2541(6), which declares it to be an infringement to "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety." 7 U.S.C. 2541(6). The court concluded that "Section 2543 * * * exempts farmers who make limited brown bag sales from this requirement." Pet. App. 13a.[7]

## SUMMARY OF ARGUMENT

I. The Federal Circuit erred in holding that 7 U.S.C. 2543 permits a farmer to sell, for use as seed, up to 50% of each crop produced from a PVPA-protected variety of seed. Properly interpreted, Section 2543 permits a farmer to sell, for use as seed, only the portion of the crop that the farmer has saved for the purpose of planting another crop. By limiting the *purpose* for which a farmer may save seed, Section 2543 has the practical effect of limiting the *amount* of saved seed that a farmer may sell to the amount reasonably necessary for the same farmer to plant another crop.

Our interpretation reflects the most natural reading of the text of Section 2543. In particular, it gives effect to the reference in Section 2543 to Section 2541(3), by virtue of which a farmer may not save seed for the purpose of selling it as seed. That interpretation is buttressed by consideration of the PVPA as a whole, which makes it clear that Section 2543 carves out only a narrow exception to the otherwise exclusive rights granted to the owner of a novel variety.

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[7] The court of appeals subsequently denied Asgrow's petition for rehearing and rejected its suggestion of rehearing en banc. Pet. App. 28a.

Our interpretation of Section 2543 also comports with the legislative history of the PVPA. That history indicates that Section 2543 was intended to permit a farmer to sell only seed that the farmer saved to plant another crop, but decided not to use because of a change in planting plans. The limits on sales of saved seed under Section 2543 discerned by the Federal Circuit, by contrast, find no support in the text or legislative history of the PVPA.

II. The Federal Circuit was correct in holding that sales under Section 2543 are exempt from Section 2541(6). Section 2541(6) states that, "[e]xcept as otherwise provided," it "shall be an infringement" of an owner's rights to dispense PVPA-protected seed in a form that can be propagated without giving notice of its protected status. Section 2543 "otherwise provide[s]": It states that the sale of protected seed authorized under Section 2543 "shall not infringe *any* right" granted by the Act. 7 U.S.C. 2543 (emphasis added). The plain language of Section 2543 thus exempts qualifying sales from the notice requirement in Section 2541(6).

## ARGUMENT

### I. 7 U.S.C. 2543 PERMITS A FARMER TO SELL, FOR USE AS SEED, ONLY THE PORTION OF A CROP PRODUCED FROM PVPA-PROTECTED SEED THAT THE FARMER SAVED FOR THE PURPOSE OF PLANTING ANOTHER CROP

The Federal Circuit erred in holding that 7 U.S.C. 2543 permits a farmer to sell, for use as seed, up to 50% of each crop produced from a PVPA-protected variety of seed. The court started off on the right foot, however, by not accepting the Winterboer's interpretation of Section 2543. They had argued that the only limitation that Section 2543 imposes on brown bag sales is that the "primary farming occupation" of both the selling farmer and the buying farmer must be "the growing of crops for sale for other



than reproductive purposes." 7 U.S.C. 2543; see Resp. C.A. Br. 21-25; see also Br. in Opp. 14-15. The Federal Circuit correctly recognized that a further limitation on brown bag sales is imposed by the reference to Section 2541(3) in the opening clause of Section 2543. Pet. App. 12a. As discussed below, however, the court misunderstood what conduct is proscribed by Section 2541(3).

A. Although 7 U.S.C. 2543 is not a model of clarity, it is most naturally read to permit a farmer to sell, for use as seed, only the portion of a crop produced from PVPA-protected seed that the farmer has saved for the purpose of planting another crop. Thus, Section 2543 permits a farmer who originally set aside seed for replanting, but who no longer needs the seed because of a change in his or her planting plans, to sell it to another farmer for use as seed. By doing so, the farmer can avoid wasting the seed. Section 2543 does not, however, permit a farmer to save and sell seed from a crop that was produced from PVPA-protected seed for the very purpose of marketing (selling) it for use as seed. By limiting the *purpose* for which a farmer may grow and save seed, Section 2543 also, as a practical matter, limits the *amount* of seed that a farmer may lawfully sell to the amount reasonably necessary for the same farmer to produce another crop.

1. The first sentence of Section 2543 consists of two parts: an opening clause, followed by a proviso. The opening clause allows a farmer, subject to the restrictions set forth in subsections (3) and (4) of Section 2541, to save seed produced by the farmer from PVPA-protected seed. The proviso to the first sentence allows the farmer to sell "such saved seed" to other farmers for use as seed. The question in this case is: How much seed may be saved under the opening clause, so as to be sold to another farmer, for use as seed, under the proviso?

The answer to that question, we submit, is found in Section 2541(3). Section 2541(3) provides that it is an infringement to "sexually multiply the novel variety as a step in marketing (for growing purposes) the variety." 7

U.S.C. 2541(3). Section 2541(3) is relevant here because the opening clause of the first sentence of Section 2543 expressly provides that a farmer may neither "save" seed nor "use" it if to do so would constitute an infringement under Section 2541(3). Thus, as the court of appeals correctly recognized, Section 2543 "does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541." Pet. App. 12a.[8]

The reference to Section 2541(3) in the opening clause of Section 2543 limits the purpose for which a farmer may produce and save seed under the first sentence of Section 2543. Without that reference to Section 2541(3), the opening clause of Section 2543 would permit a farmer to save, for *any* purpose (including for resale as seed), whatever seed has been "produced by him from" PVPA-protected seed. By virtue of the reference to Section 2541(3), however, the farmer may not have "produced"—*i.e.*, "sexually multipl[ied]"—the seed "as a step in marketing" it for use as seed. Thus, if the farmer does "produce[]" (and thereafter save) the seed for the purpose of "marketing" it as seed, the farmer's conduct constitutes an infringement under Section 2541(3), and therefore falls outside of the protection of Section 2543.

The Act does not define the term "marketing." In the absence of a statutory definition, it is appropriate to assign the word its common meaning. See, *e.g.*, *Federal Deposit Insurance Corp.* v. *Meyer*, 114 S. Ct. 996, 1001 (1994). In common usage, "marketing" encompasses "selling."[9] The

[8] The opening clause of Section 2543 refers not only to Section 2541(3) but also to Section 2541(4), which declares it to be an infringement to use a novel variety in producing a hybrid or different variety. Because Asgrow has not alleged that the Winterboers violated Section 2541(4), that provision is not implicated in this case.

[9] In its narrower connotation, the term "marketing" is synonymous with "selling"; in its broader connotation, it includes activities related to preparing a product for sale. See *Webster's Third New International Dictionary* 1383 (1986) (defining "marketing" to mean (1) "the act of selling or purchasing in a market; * * * (2) an aggregate of functions



same usage is also reflected in numerous statutory definitions of the term "marketing" in agricultural and other contexts.[10] Applying that meaning in Section 2541(3) leads to the conclusion that a farmer may not plant a PVPA-protected variety, and thereafter save the seed produced by the planting, with the purpose of selling the saved seed to others for use as seed. The farmer must act with some other purpose.[11]

involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying market information"); *The Random House Dictionary of the English Language* 1177 (2d ed. 1987) (defining "marketing" to mean (1) "the act of buying or selling in a market * * * (2) the total of activities involved in the transfer of goods from the producer or seller to the consumer or buyer, including advertising, shipping, storing, and selling").

[10] See 7 U.S.C. 1301(b)(6)(C) (defining "[m]arket" to mean "to dispose of peanuts * * * by voluntary or involuntary sale, barter, or exchange, or by gift inter vivos"); 7 U.S.C. 2116(g) ("The term 'marketing' includes the sale of cotton or the pledging of cotton to the Commodity Credit Corporation as collateral for a price support loan."); 7 U.S.C. 2702(*l*) ("The term 'marketing' means the sale or other disposition of commercial eggs [and related products] * * * in any channel of commerce."); 7 U.S.C. 4302(12) ("The term 'marketing' means the sale or other disposition in commerce of cut flowers [and related products]."); 7 U.S.C. 4602(13) (similar definition of "marketing" for honey and honey products); 7 U.S.C. 6102(8) (Supp. IV 1992) (similar definition of "marketing" for mushrooms); 7 U.S.C. 6202(7) (Supp. IV 1992) (similar definition of "marketing" for limes); 7 U.S.C. 6302(8) (Supp. IV 1992) (similar definition of "marketing" for soybeans and soybean products); see also 7 U.S.C. 3002 (defining "direct marketing from farmers to consumers" to mean "the marketing of agricultural commodities at any marketplace * * * established and maintained for the purpose of enabling farmers to sell * * * their agricultural commodities directly to individual consumers, or organizations representing consumers"); 16 U.S.C. 796(19) (defining "Federal power marketing agency" to mean "any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy").

[11] The court of appeals erred in concluding that Section 2541(3) prohibits only one "form of marketing"—namely, "extensive or coordinated selling activities, such as advertising, using an intervening sales

The purpose for which a farmer permissibly may produce and save seed from PVPA-protected seed is set forth in the opening clause of Section 2543. Under that clause, the farmer may "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." 7 U.S.C. 2543. In other words, the farmer may use seed that has been produced from protected seed, and then saved, for the purpose of producing another crop. The farmer may then do either of two things with that subsequent crop: (1) use the crop on his or her own farm (for example, for animal feed, personal consumption, or replanting), or (2) sell the crop to others for consumption purposes, in accordance with the second sentence of Section 2543. Thus, although the ensuing *crop* may either be used on the farm or be sold to others, the use of the "saved seed" itself that is permitted by the opening clause of Section 2543 is limited to the "production of a crop."[12]

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representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a. There is no support for that conclusion in the text of Section 2541(3), which refers to "marketing" without qualification. Indeed, the text of Section 2541(3) covers not only all forms of marketing but also any "step" in the marketing process. Thus, far from barring only large-scale selling activities, Section 2541(3) bars all sales and activities preparatory to sales.

[12] The court of appeals misread the portion of the opening clause of Section 2543 that permits a farmer to "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." The court of appeals believed that the phrase "for sale as provided in this section" modifies the word "seed," and the court accordingly read the clause in which the phrase appears to be the source of authority to sell saved seed. See Pet. App. 7a. In our view, however, the "for sale" phrase modifies the word "crop," so that the clause of which it is a part refers, not to the sale of the saved *seed* (a subject that is instead governed by the proviso to the first sentence of Section 2543), but to the sale of the *crop* produced from the saved seed (a subject that is further addressed by the second sentence of section 2543). This interpretation is supported by the grammatical structure of the sentence, which indicates that both prepositional phrases that begin



The sale of "saved seed" for use as seed is permitted under the proviso to the first sentence of Section 2543, which states:

> *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

By referring to "such saved seed," the proviso limits the seed that may be sold to the seed that has been saved under the opening clause. As discussed above, the opening clause does not permit seed to be produced and saved for the purpose of selling the seed for use as seed; instead, it permits seed to be produced and saved for the purpose of producing another crop. Therefore, the proviso permits a farmer to sell, for use as seed, only the seed that the farmer has produced, and thereafter saved, in order to produce another crop. Pet. App. 21a-24a.[13]

Although the permissibility of selling saved seed for use as seed thus turns on the purpose for which the farmer produced and saved the seed in the first place, we think

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with "for" ("for sale [etc.]" and "for use [etc.]") should modify the noun ("crop") that immediately precedes them.

[13] Thus, we agree with the district court that Section 2543 permits a farmer to save seed only for the purpose of planting another crop. See Pet. App. 21a-22a. We reach that conclusion, however, by a different route. The district court based its conclusion on its view that the phrase "for seeding purposes" modifies the word "saved" and thus restricts the purpose for which seed may be saved. *Id.* at 21a. As the court of appeals determined, the phrase "for seeding purposes" does not modify "saved"; rather, it modifies "obtained," and refers to the purpose for which the seed was obtained by authority of the owner. *Id.* at 11a-12a. We trace the limitation on the purpose for which seed may be saved to Section 2541(3), based on the reference to Section 2541(3) in the opening clause of Section 2543:

that in infringement actions the courts ordinarily would not need to conduct an elaborate inquiry into the farmer's subjective intent at the time of planting and harvesting; it would be appropriate for a court to infer the farmer's purpose from the amount of seed that the farmer saved. If the farmer saved more seed than he or she reasonably could use to produce another crop, and thereafter sold that seed to others for use as seed, it would be reasonable to infer that the farmer produced the seed from the outset (and saved it) with the purpose of selling it to others for use as seed, in violation of Section 2541(3).[14] That inference would be especially well founded when, as in this case, the amount of seed that was saved and sold for seeding purposes exceeded by many times over the amount needed for replanting.[15]

[14] That is not to say that a farmer may save only the amount of seed necessary to produce a crop of the same size in the immediately ensuing crop season. As the district court explained, if the farmer planted only 500 acres of soybeans in one crop season, but planned to plant 1000 acres in the next crop season, the farmer could save enough seed to plant 1000 acres. Pet. App. 21a-22a. Moreover, a farmer would not be limited, under our interpretation, to saving only the amount of seed necessary for the immediately ensuing crop season; the farmer could save enough for his or her planting purposes for any number of ensuing seasons. According to one of the amici that appeared in the court of appeals, the growers of certain types of vegetables find it necessary to set aside from a single crop "as much as a four or five year supply" of seed for replanting purposes. Corrected Br. for Amicus Curiae Tanimura & Antle, Inc. 5.

[15] Assuming, as the district court did (Pet. App. 22a n.3) and as petitioner asserts (Pet. 3), that it takes one bushel of soybeans to plant one acre, the Winterboers would have needed to save 265 bushels of soybeans to produce a crop of the same size as the crop they produced in 1990. See Pet. App. 35a. The amount of soybeans that they actually saved, and sold as seed, was more than 38 times that amount: 10,529 bushels. *Ibid.* Although we do not believe that the Winterboers were limited to saving only enough seed to produce a crop of the same size in the immediately ensuing crop season, see note 14, *supra*, the Winterboers have never suggested that they originally saved more than 10,000 bushels of soybeans for the purpose of replanting 38 times the amount of acreage they planted in 1990 or replanting the same amount of acreage as they planted in 1990 over the next 38 crop seasons.



2. The interpretation of Section 2543 that we have offered above is buttressed by consideration of the PVPA as a whole. See *Conroy* v. *Aniskoff*, 113 S. Ct. 1562, 1565 (1993) (meaning of statutory language depends on context). Congress enacted the PVPA to "afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties." 7 U.S.C. 2581; see also 115 Cong. Rec. 31,282 (1969) (statement of Sen. Miller). The primary form of encouragement provided by the Act is the grant of exclusive rights to the developers of new varieties for an 18-year period, including the exclusive right to sell, import, and export a protected variety. 7 U.S.C. 2483(a); see also 115 Cong. Rec. 31,282 (1969) (statement of Sen. Miller). Most of the PVPA is devoted to explicating those rights, defining what actions infringe them, and providing for their enforcement through a certification process and private infringement actions.

Section 2543 carves out an exception to the exclusive rights otherwise afforded by the PVPA. Consistent with that function, Section 2543 should be read to permit only those limited sales of saved seed by a farmer that are necessary to prevent wasting of the saved seed if the farmer's replanting plans change. That interpretation affords appropriate financial protection for the farmer. At the same time, it conforms to and protects the legitimate expectations of the owner of exclusive rights in the novel variety at the time it sold the seed to the farmer—namely that the seed the owner sold would be used to grow a crop that would in turn be used on the purchaser's farm or sold for consumption purposes, but that a limited amount of the crop the purchasing farmer would grow with the seed might be used as seed.

As Judge Newman explained in dissenting from the denial of rehearing en banc, "[t]he statute was not designed to place farmers in the seed business." Pet. App. 32a; see also 116 Cong. Rec. 34,680 (1970) (remarks of Sen. Miller); *id.* at 40,296 (remarks of Rep. Poage). Our interpretation of Section 2543 is consistent with that view, because it does not permit farmers to plant a novel variety of seed for the purpose of producing seed to sell in competition with the owner of protected rights in the novel variety. The Federal Circuit's interpretation, in contrast, permits a farmer to do precisely that with up to half of each crop produced from protected seed.[16] By permitting farmers to make such extensive sales of seed, for use as seed, the Federal Circuit's interpretation "nullifies" the economic incentive that Congress intended the PVPA to provide for plant breeders to assume the costs and risks of developing new varieties. Pet. App. 30a (Newman, J., dissenting from denial of rehearing en banc). That interpretation thus thwarts the stated purpose of the PVPA.

B. The legislative history of Section 2543 likewise furnishes no support for the Federal Circuit's interpretation.

The original version of the bills that became the PVPA contained no provision allowing farmers to sell "saved seed" for seeding purposes. Instead, those bills included a "saved seed" provision, which allowed a farmer to save only

[16] In the case of soybeans, for example, in a single crop cycle a farmer could, under the Federal Circuit's interpretation, produce and sell, as seed, up to 22 and 1/2 times the amount of soybeans that the owner of the variety sold to the farmer (based on a yield of 45 bushels for each bushel planted). See Pet. App. 32a n.2. By comparison, as we interpret it, Section 2543 would generally permit a farmer to sell, as seed, no more than 1/45 (or about 2%) of the crop produced from a PVPA-protected variety of soybean, which would represent the same amount that the farmer purchased from the owner of the variety to produce the crop. See Pet. App. 11a; but cf. note 14, *supra* (farmer may save enough seed for replanting larger acreage and in more than one crop season).



enough of the seed produced from protected seed for replanting, and a separate "crop exemption" provision, which allowed farmers to sell the crop produced from protected seed for consumption (but not planting) purposes.[17]

The right to sell "saved seed" for seeding purposes was added to the final bill, when the "saved seed" and "crop exemption" provisions were combined into what became Section 2543. See 116 Cong. Rec. 34,679 (1970). As described in the committee reports, Section 2543

> authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed for reproductive purposes to other persons so engaged.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970) (same). That description makes clear that under Section 2543 a farmer may sell, for seeding purposes, only such PVPA-descended seed as the farmer has saved for the farmer's own use. Thus, as the district court recognized, Congress contemplated only sales of limited amounts of seed, occasioned by

[17] Under the proposed "saved seed" provision, unless the seed was grown as a step in marketing seed or for producing a hybrid, a farmer could have saved seed from a PVPA crop "and grow[n] the resulting variety for his own use." S. 3070, 91st Cong., 1st Sess., § 112 (1969); H.R. 13,631, 91st Cong., 1st Sess., § 112 (1969); see also 115 Cong. Rec. 31,282 (1969) (reproducing S. 3070, as introduced). Under the proposed "crop exemption" provision, it would not have been an infringement to sell seed saved under the "saved seed" provision "for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose." S. 3070, *supra*, § 114; H.R. 13,631, *supra*, §114.

a change in the selling farmer's planting plans. Pet. App. 22a.[18]

C. The Federal Circuit recognized that "without meaningful limitations, [Section 2543] could undercut much of the PVPA's incentives." Pet. App. 12a. The limitations the court adopted in response to that concern, however, find no support in the text or legislative history of the Act.

The Federal Circuit based its holding that a farmer may sell up to 50% of a crop as brown bag seed upon its interpretation of the requirement in Section 2543 that both the seller and buyer of the seed have, as their "primary farming occupation," the "growing of crops for sale for other than reproductive purposes." 7 U.S.C. 2543. The Federal Circuit adopted a "crop-by-crop" approach to determining whether that requirement is satisfied, reasoning that, as long as 50% or more of a farmer's particular crop is sold for non-reproductive purposes, the farmer's "primary farming occupation," with respect to that crop, is the growing of the crop for sale for non-reproductive purposes. Pet. App. 8a. Nothing in the text or legislative history of Section 2543, however, suggests that courts should use a crop-by-crop approach instead of, for example, an approach based on the primary source of the farmer's income.[19]

There is likewise no support in the text of Section 2543 for the court's determination that a farmer who purchases brown bag seed cannot save any portion of the seed produced from it. See Pet. App. 6a; p. 8, *supra*. Section

[18] The passage from the committee report quoted in the text, *supra*, could be read to contemplate that a farmer may sell, for use as seed, seed that has been saved not only for replanting, but also for use on the farm. No party, however, has supported such an interpretation of the statute, and we do not believe that such an interpretation can be squared with the text of the statute.

[19] The crop-by-crop approach was the court of appeals' own invention. The Winterboers argued in the court of appeals that to satisfy the "primary farming occupation" requirement, "a farmer need only sell the majority of his crop for consumption." Resp. C.A. Br. 24.



2543 permits a farmer to save seed "produced by him from seed obtained, or *descended from* seed obtained, by authority of the owner of the variety," 7 U.S.C. 2543 (emphasis added). Brown bag seed is plainly "descended from" seed obtained by authority of the owner.

As discussed above, the operative limitation on the amount of saved seed that a farmer may sell under Section 2543 is found in that Section's incorporation of the prohibition in Section 2541(3) against sexually multiplying a protected variety of seed as a step in marketing it for use as seed. The court of appeals erred by failing to give effect to that limitation, which is imposed by the Act itself, and by adopting other limitations that have no basis in the Act.[20]

[20] In support of their argument, the Winterboers heavily relied below on three documents obtained from the Department of Agriculture. See Resp. C.A. Br. 32-33 & n.21; Resp. C.A. Reply Br. 28-32. Their reliance on those documents (*reproduced at* J.A. 13-15, 20, 34-35) is misplaced. The earliest such document is a 1973 letter from a PVPO commissioner that sought to answer certain "hypothetical" questions and stated that the only limitation on brown bag sales is the requirement that the selling farmer's and buying farmer's "primary farming occupation" be the growing of crops for non-reproductive purposes. J.A. 13. The 1973 letter does not address the "marketing" prohibition in Section 2541(3) or indicate to what extent the author's view represented the position of the Department. The second document, a PVPO "Activity Report" from October 1987, concerned the Department's authority to issue regulations concerning the scope of Section 2543; the document said nothing about the meaning of Section 2543. J.A. 20. The third document is a report co-authored by a USDA agricultural economist and an outside economist, surveying "Intellectual Property Rights and the Private Seed Industry" (USDA, Economic Research Service, *Agricultural Economic Report* No. 654 (1991)). J.A. 34. That report referred (J.A. 34) to a district court decision for the proposition that under the PVPA, "49% of a harvest can be sold as seed." The report did not suggest that the Department had independently come to that view. Thus, none of the documents cited by respondents purported to reflect a formal agency determination regarding the question of statutory interpretation presented here. The court of appeals was correct not to rely on those documents or to accept the argument founded upon them. In any event, the Department has now carefully

## II. 7 U.S.C. 2543 EXEMPTS SALES OF SAVED SEED FROM THE NOTICE REQUIREMENT IN SECTION 2541(6)

In addition to addressing the scope of the "saved seed" exemption in Section 2543, the court of appeals addressed a further question: whether a farmer who sells saved seed under Section 2543 is required, by Section 2541(6), to give notice to the purchaser of the seed's protected status. Although the Court granted certiorari on the notice issue (the second question presented in the petition), the Court may decline to reach it. If the Court does reach it, however, the Court should affirm the court of appeals' holding (Pet. App. 13a) that sales of saved seed under Section 2543 are not subject to the notice requirement in Section 2541(6).

A. The district court found it unnecessary to decide whether the Winterboers' sales violated the notice requirement in Section 2541(6). Pet. App. 25a. The Winterboers accordingly did not raise the notice issue on appeal. The notice issue was, instead, raised for the first time on appeal in Asgrow's brief as appellee. Pet. C.A. Br. 35-38. Although the Winterboers joined the issue in their reply brief, they asserted at the same time that "notice is not at issue on this appeal." Resp. C.A. Reply Br. 16. Under those circumstances, it is doubtful that the issue was properly before the panel, as we indicated in our brief at the petition stage (at 20 n.17), and as Judge Lourie indicated in his concurring opinion below (Pet. App. 14a).

This Court need not address the notice issue if it reverses the court of appeals' holding on the first question presented. That disposition of the first question would, in effect, sustain the district court's holding that the Winterboers' sales did not fall within the saved seed exemption of Section 2543. See Pet. App. 24a (Winterboers

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considered the questions presented here, and its views are those set forth in this brief.



"admittedly have sold much more than th[e] amount of seed" reasonably necessary for planting another crop of soybeans). It therefore would not be necessary to decide whether sales that *do* fall within Section 2543 must meet the notice requirement in Section 2541(6).

If the Court affirms the court of appeals' holding on the first question presented, the Court still might choose not to reach the notice issue, in view of the interlocutory posture of this case. See U.S. Br. on Pet. 19-20. The court of appeals remanded the case to the district court for proceedings on whether the Winterboers' sales qualified under Section 2543, as interpreted by the court of appeals. Pet. App. 13a. If this Court agrees with the court of appeals' interpretation, it may well be determined on remand that the Winterboers' sales do not fall within Section 2543. See U.S. Br. on Pet. 19 n.16. In that event (just as in the event that this Court reverses on the first question), it would be unnecessary to decide whether sales that *do* fall within Section 2543 must meet the notice requirement in Section 2541(6).

B. If the Court reaches the notice issue, its proper resolution is not free from doubt. On balance, however, we believe that the court of appeals was correct in holding that sales of saved seed under Section 2543 are exempt from the notice requirement in Section 2541(6). See Pet. App. 13a.

1. The court of appeals' holding, in our view, is supported by the language of the two statutory provisions.

Section 2541 provides in relevant part:

> Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts * * *:
>
> * * * * *
>
> (6) dispense the novel variety to another, in a form which can be propagated, without notice as to

> being a protected variety under which it was received[.]

Although subsection (6) is awkwardly worded, its import is clear enough: Unless "otherwise" provided in the Act, it is an infringement to dispense a novel variety without giving notice to the recipient of the variety's protected status.[21]

Section 2543 does appear to provide otherwise. Specifically, the proviso to the first sentence of Section 2543 states:

> *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

A sale of saved seed "for reproductive purposes" under the proviso plainly constitutes "dispens[ing] the novel variety to another, in a form which can be propagated." For that reason, such a sale, without the requisite notice, would be an infringement under subsection (6) of Section 2541, unless a different section of the Act provided otherwise. The proviso in Section 2543 provides otherwise by stating that such a sale "shall not infringe *any* right hereunder." 7 U.S.C. 2543 (emphasis added). The proviso thus appears to encompass *any* right recognized elsewhere in the Act, including the owner's right, recognized in subsection (6), not to have the novel variety dispensed without notice of its protected status. Thus, we believe that the proviso exempts qualifying sales from the notice requirement in subsection (6).

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[21] See S. Rep. No. 1138, *supra*, at 12 (subsection 6 applies to "dispensation of the novel variety to another without notice that it is a protected variety"); H.R. Rep. No. 1605, *supra*, at 11 (same).



We recognize that there is language in the proviso that could be read to support a contrary conclusion. The proviso states that the sale of saved seed, for use as seed, is permitted "without regard to the provisions of section 2541(3)." That reference to Section 2541(3) could be read, in isolation, to mean that sales under the proviso are exempt only from infringement liability based on Section 2541(3), but not from infringement liability based on some other provision, such as Section 2541(6). That reading, however, is undermined by the immediately succeeding language in the proviso, just discussed, stating that sales under the proviso "shall not infringe *any* right" under the Act. The latter language indicates that the exemptive force of Section 2543 is not limited to the rights recognized in Section 2541(3).

In this connection, it is significant that even petitioner Asgrow, which argues for a narrow reading of Section 2543, assumes (Pet. 22) that the exemption from liability afforded by Section 2543 must extend, at least, not only to Section 2541(3)—which prohibits the sexual multiplication of a novel variety—but also to Section 2541(1)—which prohibits any sale or transfer of a protected variety. That assumption presumably is based on the view that, unless the proviso extends to Section 2541(1), all sales of saved seed under the proviso would be barred under Section 2541(1). If such sales were barred under Section 2541(1), then the proviso would not actually permit any sales of saved seed, contrary to its obvious purpose.

2. Asgrow nonetheless contends that sales of saved seed are subject to the notice requirement in Section 2541(6). In our view, its arguments in support of that contention are substantial but ultimately unpersuasive.

Asgrow's primary argument emphasizes that the proviso to the first sentence of Section 2543 authorizes only a *sale* of saved seed; therefore, Asgrow argues, Section 2543 provides an exemption from infringement liability only with respect to the provisions in Section 2541 that relate to *sales*—namely, Section 2541(1) and Section

2541(3). Asgrow takes the position that Section 2541(6) does not relate to sales, but rather to the giving of notice in connection with sales. Pet. 22. Asgrow's argument thus depends on treating a sale of seed, on the one hand, and the giving of notice in connection with the sale, on the other hand, as two distinct actions, only one of which is exempted from infringement liability under Section 2543.

The problem with that argument is that it rests upon the assumption that subsection (6) is not related to sales. Subsection (6) applies whenever one "dispense[s]" a novel variety in a form capable of propagation, including dispensing in the course of a sale. Thus, it does not accord with the language of subsection (6) to treat a sale (or any other transfer) of seed as distinct from the giving of notice in connection with the sale (or other transfer). Under subsection (6), the duty to give notice arises only upon a transfer of protected seed, including a transfer by sale.

Asgrow also has argued that "requiring notice on all seed sales, whether 'brown bag' seed or not, is consistent with Congress's intent in 7 U.S.C. § 2567 that a purchaser or user of the protected seed have actual notice of prohibited acts before being subject to damages for infringement." Pet. 23; see also Pet. C.A. Rehearing Pet. 15; Pet. C.A. Br. 37. That argument appears to depend on the assumption that, under Section 2567, a purchaser of brown bag seed may not be held liable for damages in an infringement action unless the owner of the variety proves that the purchaser had notice of the seed's protected status. That assumption, in our view, is unwarranted.

Section 2567 does not require the owner to prove that the infringer had notice of the seed's protected status in every infringement action. Section 2567 requires such proof only "[i]n the event the novel variety is distributed by authorization of the owner and is received by the infringer without" labeling or marking that indicates the seed's protected status. Thus, when a sale of brown bag seed occurs without the "authorization of the owner," it does not appear the owner must prove notice in order to



recover damages from the infringer.[22] The purchaser of "brown bag" seed, which typically is not labeled as protected, therefore could be held liable in damages for any infringing use of that seed, even if the purchaser did not have actual notice of the protected status of the seed, and even if the sale, though not authorized by the owner, was authorized by Section 2543.[23]

[22] If the owner authorized the sale, it is reasonable to require the owner to prove notice with regard to a sale of seed that is not labeled as protected. In that situation, the owner presumably is in a position to ensure that the seed is labeled as protected. When a sale of seed is not authorized by the owner, the owner presumably would not have that ability. But in that event, if the seed is not labeled as protected, the purchaser may be able to raise lack of notice in mitigation under the last sentence of Section 2567, which states: "As to both damages and injunction, a court shall have discretion to be lenient as to disposal of materials acquired in good faith by acts prior to such notice."

[23] As we discussed in our brief at the petition stage (at 17-19), bills have been proposed in each House of Congress that would amend Section 2543 by striking out the proviso to the first sentence of Section 2543, thereby eliminating the authority of farmers to sell saved seed to other farmers for use as seed. S. 1406, 103d Cong., 1st Sess. § 9 (1993); H.R. 2927, 103d Cong., 1st Sess. § 9 (1993). The Senate bill has been the subject of hearings before the Senate Committee on Agriculture, Nutrition, and Forestry, but it has not yet been reported out of that committee. A committee hearing on the House Bill began on May 24, 1994. For reasons discussed in our brief at the petition stage (at 18-19), enactment of the bills in their current form would not render this case moot.

## CONCLUSION

With respect to the first question presented in the petition, the judgment of the court of appeals should be reversed. If the Court reaches the second question presented in the petition, it should affirm the judgment of the court of appeals with respect to that question.

Respectfully submitted.

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